

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
January 10, 2002

In Reply Refer To:
1800B3-GDG

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In re: KSDG(AM), Julian, CA
Facility ID No. 84907
BP-19961227AA,
as modified by BMP-
19990624AC

Dear Counsel:

This letter concerns the petition, filed August 21, 2001 on behalf of JNE Investments, Inc. ("JNE") for reconsideration of the denial of its request for waiver of the tolling provisions of 47 C.F.R. §73.3598(b) and of the AM major change processing rule, 47 C.F.R. §73.3571(h).¹ For the reasons detailed below, JNE's petition for reconsideration is denied.

Background. On June 23, 1999, the staff granted the initial permit for Mountain Communities Radio ("Mountain") to construct a new Class B AM station to serve Julian, California on 890 kHz. The permit is for a three-year term expiring June 23, 2002. See *Report and Order* in MM Docket 98-43 ("*Streamlining R&O*"), 13 FCC Rcd 23056, 23090 (1998), *recons. granted in part and denied in part* ("*Streamlining MO&O*"), 14 FCC Rcd 17525 (1999) (collectively "*Streamlining Orders*"), and 47 C.F.R. §73.3598(a).

JNE's principal, Jeffrey N. Eustis ("Eustis"), acquired the referenced permit from Mountain on December 14, 2000. Approximately five months later, Eustis requested that the staff either treat the referenced permit pursuant to the Commission's tolling rules or waive the rules to extend the permit's expiration date beyond June 23, 2002. Eustis alleged that such action was called for in this instance on the belief that the San Diego County ("the County") zoning authorities would not, if presented with the matter, issue the required special use permit for the site chosen by the predecessor permittee.

In support of this allegation, Eustis supplied statements from local attorney William D. Pettersen ("Pettersen") and local real estate agent Fred Neilsen ("Nielsen"). Pettersen stated that the County requires extensive permit hearings for any proposed

¹We also take note that JNE filed a Petition for Issuance of Writ of Mandamus with the United States Court of Appeals for the District of Columbia Circuit on August 21, 2001, requesting that the Court compel the Commission to accept and process an application prepared by the petitioner for major modification of the unbuilt station's permit.

communications tower exceeding 50 feet (15.2 meters), and that such requests have been denied in the past. Pettersen characterized any attempt to secure such a permit as “fruitless.” Pettersen and Nielsen indicated that there are no other suitable land parcels in the Julian, California vicinity, and Pettersen recommended that Eustis avoid any zoning controversy in the Julian area by mounting KSDG’s antenna on an existing communications tower at another site.

On May 16, 2001, Eustis sought authority to move to another site and to serve a different community. As the Commission was not accepting major change applications at that time, Eustis requested a waiver of the Commission’s AM processing rules, 47 C.F.R. §73.3571(h), to file a major change modification application outside of an announced filing window.² Eustis noted that he was not the permittee of record during the prior AM major change window (January 24-February 1, 2000), and therefore could not file the desired application at that stage. Consequently, Eustis contended that, with no AM major change filing window contemplated in the near future, we must waive the AM processing rules to enable Eustis to resolve the alleged site problems by moving to a different community.

We denied Eustis’s requests on July 30, 2001. In denying Eustis’s request for treatment pursuant to the Commission’s tolling rules, we noted that the alleged zoning problems were not the subject of judicial review by any court of competent jurisdiction, the only circumstances in which a zoning-related matter is considered a tolling event. We proceeded to deny Eustis’s request for waiver, finding that request both unsupported and unexceptional. We noted that there had been no adverse zoning action and that Pettersen’s prediction of such action was “nothing more than speculation.” We further stressed, however, that we would not waive the rules even had Eustis provided documentation because the circumstances were not rare and exceptional. In particular, we stated that “a diligent permittee in its initial application is expected to designate a site suitable for the prompt construction of its proposed facilities” and that “a party that seeks to acquire an outstanding permit is expected to assure itself that the facilities can be constructed.” *See Streamlining MO&O*, 14 FCC Rcd at 17539. Finally, we declined to waive the processing rules to open an AM filing window for Eustis. We ruled that Eustis assumed the construction obligations of the original permittee, including that permittee’s apparent failure to ascertain any zoning problems or to avail itself of the earlier AM major change filing window that was available to it.

On April 11, 2001, the staff approved a *pro forma* assignment of the permit from Eustis to JNE Investments, a company that Eustis controls. The assignment has since been consummated. Thus, JNE, rather than Eustis, filed the petition for reconsideration.

Discussion. A petition for reconsideration must be based on facts or changed circumstances that the petitioner, through the exercise of ordinary diligence, could not have learned prior to his last opportunity to present such matters, and/or on material

²This proposal would be considered a major change because, pursuant to 47 C.F.R. §73.3571(a)(1), the proposed relocation would mandate a change in the station’s specified community of license.

errors or omissions in the underlying opinion. *See* 47 C.F.R. §§1.106(c) and (d). On reconsideration, JNE alleges that the staff erred in its treatment of the request for waiver.

The Commission will grant a waiver of the construction period rule when “rare and exceptional circumstances” beyond a permittee’s control prevent completion of construction within three years of the grant of the initial permit. *Streamlining MO&O*, 14 FCC Rcd at 17541. With respect to loss of site, the Commission stated that it would not consider waivers for permittees who make a business decision not to use an approved site unless that site became “unavailable for reasons not attributable to the permittee.” *Streamlining MO&O*, 14 FCC Rcd at 17541.³

On reconsideration, JNE argues that the waiver denial is inconsistent with case law. JNE alleges that the staff was obligated pursuant to the Commission’s determination in *Stearns County Broadcasting Company* (“*Stearns*”), 71 FCC 2d 412, 414 (1979), to accept Pettersen’s statement at face value as documentation that the Julian tower site is not available for reasons beyond the permittee’s control.⁴ JNE also argues, citing *Salinas Broadcasting Limited Partnership* (“*Salinas*”), 67 RR 2d 237, 239 (Review Board 1989), that neither permittees nor prospective assignees are required to initiate any proceeding regarding a site’s availability prior to filing an application to construct or to purchase an unbuilt construction permit.⁵ JNE therefore concludes that it is entitled either to additional time to construct or, in the alternative, to a waiver of the Commission’s AM processing rules to permit JNE to submit a major modification application.

We find these arguments without merit. *Stearns* and *Salinas* do not discuss waivers of construction deadlines. Moreover, they were issued at a time when the Commission’s former construction policies were in effect. The Streamlining Orders set forth the grounds for obtaining a waiver under the new more stringent construction requirements, and thus are controlling in this case. In these orders, the Commission explicitly excluded non-judicial zoning matters from the category of circumstances that trigger the tolling provisions detailed in Section 73.3598(b) of its rules. *Streamlining MO&O*, 14 FCC Rcd at 17539.⁶ Nor do we find that “rare and exceptional”

³As is the case with any waiver request, applicants must both “articulate a specific pleading and adduce concrete support, preferably documentary” (emphasis added). *WAIT Radio*, 418 F.2d at 1157 n.9, citing *Pikes Peak Broadcasting v. FCC*, 422 F.2d 671 n.8 (D.C. Cir. 1969).

⁴*Stearns* conveyed the Commission’s willingness to entertain affidavits from real estate agents, landowners or other disinterested parties attesting to site availability in the context of a waiver of the Commission’s minimum distance separation requirements, 47 C.F.R. §73.207.

⁵*Salinas* established that an applicant’s reasonable assurance of the availability of its proposed tower site is called into question when local governmental authorities document that they will not provide the required land use authority for the specified site.

⁶The Commission stated that diligent permittees can either eliminate or mitigate zoning delays by applying for approval from the pertinent local authority prior to the staff’s issuance of a construction permit, and noted that agency precedent establishes that applicants will not have reasonable assurance of the availability of that site unless it has contacted the local authority prior to filing its permit application with the Commission. *Id.*, at 17540.

circumstances beyond the permittee's control are present here. JNE, without determining the viability of the authorized site prior to acquisition and without applying to the County for zoning approval after acquisition, made a decision to change sites. It has not shown that there are any circumstances beyond its control.

JNE's reading of its obligation to exercise due diligence is erroneous. JNE attempts to attribute the alleged site problems "to the foibles of the prior permittee with whom JNE had no privity prior to the acquisition [of the permit]"⁷ and which did not avail itself of a filing window for AM major change applications. However, JNE's status as successor permittee did not relieve itself of the responsibility to ensure that the station's pre-construction site assurances were in place.⁸ The Commission unambiguously placed interested parties on notice that the failure to take essential preliminary steps to ensure that construction can commence when an authorization is received deprives the public of "the prompt initiation of additional broadcast service and represents an abuse of the Commission's processes." *Streamlining MO&O*, 14 FCC Rcd at 17539.

Accordingly, JNE's petition for reconsideration IS DENIED, and the construction period expiring June 23, 2002 remains unchanged. *Streamlining MO&O*, 14 FCC Rcd at 17542 n.60. This action does not prejudice any future request for treatment pursuant to the Commission's tolling rules and/or for waiver of the applicable construction period rule based on any new circumstance that may occur prior to permit expiration.

Sincerely,

Peter H. Doyle, Chief
Audio Services Division
Mass Media Bureau

⁷*Petition for Reconsideration*, at paragraph 9.

⁸The Commission does not recalculate the three-year period each time a permit experiences a consummated ownership change. *Streamlining R &O*, 13 FCC Rcd at 23090.